WEST VIRGINIA SUPREME COURT OF APPEALS

No. 070854

ELIZABETH A. SEDLOCK and
JASON BANISH,

Plaintiffs Below, Appellants herein,

vs.

MARSHA ANN FELTON,
JEAN HOLLANDSWORTH,
DOUBLE H. REALTY, INC.,
which is a West Virginia corporation,
DAVID A ROMANO and
CATHY JOEY ROMANO,

Defendants below, Appellees herein.

FILED
DEC 3 2007
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

APPELLANTS' REPLY BRIEF

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THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This is Rule 54 Appeal of an Order entered on 24th day of October, 2006, by the Circuit Court of Harrison County, West Virginia, in a civil action against appellants' real estate agent, agency, and broker, the appellees, concerning the sale of Elizabeth Sedlock's (an appellant) former home at 601 Indiana Avenue, Nutter Fort, West Virginia. The Circuit Court of Harrison County, West Virginia, granted a motion to dismiss the appellees and made such immediately appealable under Rule 54(b) of the West Virginia Rules of Civil Procedure. In a matter that does not relate to the case now before this Court, the appellants settled with the Romanos, who listed to sell 339 Worley Avenue, Clarksburg, West Virginia, and who had breached their contract to sell 339 Worley Avenue, Clarksburg, West Virginia to the appellants.

STATEMENTS OF FACTS

When the case at bar was initially filed, it involved two separate legal wrongs. The first half of the first legal wrong was that appellee Felton, as an agent of appellant Sedlock, her principal, did not do what her principal, appellant Sedlock, requested (i.e., put in a purchase offer contract between appellant Sedlock and the Moyles a contingency provision that "Elizabeth A. Sedlock . . . would not sell 601 Indiana Avenue, Nutter Fort, WV 26301, unless the sale was completed for 339 Worley Avenue, Clarksburg, WV 26301 (, which) Marsha Ann Felton said she understood and could not blame Elizabeth A. Sedlock." [See paragraph 19 of the complaint]).

Appellee Felton had previously put a similar provision in a in a purchase offer contract between appellant Sedlock and the Moyles dated March 29, 2004. See paragraphs 6 and 7 of the complaint and Exhibit 5 attached to and incorporated into the complaint. Appellees admitted this

at page 5 of their brief. The Feltons unsuccessfully tried to talk appellant Sedlock out of the contingency provision on June 1, 2004. See paragraph 10 of the complaint

Appellee Felton also prepared a purchase offer contract between appellant Sedlock and the Romanos with a contingency provision requested by appellant Sedlock that it was "(c)ontingent upon buyers closing on the sale of their home at 601 Indiana Avenue, Nutter Fort, WV 26301, prior to the closing date on 339 Worley Avenue, Clarksburg, WV 26301. See paragraph 14 of the complaint and Exhibit 6 attached to and incorporated into the complaint. Appellees admitted this at page 5 of their brief.

Appellant Sedlock and appellee Felton learned between June 26, 2004, and July 3, 2004, that Mr. Romano previously had reneged on honoring a purchase offer contract. See paragraph 19 of the complaint.

On July 5, 2004, appellee Felton prepared the purchase offer contract between appellant Sedlock and the Moyles and left out the contingency that "Elizabeth A. Sedlock . . . would not sell 601 Indiana Avenue, Nutter Fort, WV 26301, unless the sale was completed for 339 Worley Avenue, Clarksburg, WV 26301." See paragraph 19 of the complaint. Appellees admitted this at page 5 of their brief.

On July 5, 2004, appellee Felton, the agent, committed the second half of the first legal wrong when she did not tell the truth to appellant Sedlock by saying the July 5, 2004, purchase offer contract had the same provisions as the first one. See paragraph 21 of the complaint and Exhibit 8 attached to and incorporated into the complaint.

The appellees have asserted in their brief on the last two lines of page 5 that the contingency was not written in the contract because acceptable housing had been located and the

appellees have asserted in their brief in the last sentence of the first paragraph on page 10 that the appellee Felton ". . . drafted the contract with the terms she believed necessary to complete the sale of the real estate." However, the only mention in the complaint that was dismissed about this is that appellee Felton admitted she failed to include the contingency. When confronted by appellant Sedlock as to why she failed to make the inclusions, appellee Felton said the appellants already had a home to purchase, but appellee Felton said she knew that appellant Sedlock did not want to sell her home if the Romano sale fell through. See paragraph 39 of the complaint.

The second legal wrong occurred when Mr. Romano reneged on selling the Romanos' home to the appellants. The second legal wrong has been mediated and settled. The case at bar is about the first legal wrong.

THE ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN LOWER TRIBUNAL

The trial court erred in dismissing the appellants' complaint against appellees herein. The case was dismissed by the trial court with language appropriate for a Rule 54 appeal.

POINTS AND AUTHORITIES RELIED UPON

CONSTITUTIONS:

United States Constitution, Fifth and Fourteenth Amendments

Article 3, § 10, of the West Virginia Constitution

STATUTES:

West Virginia Code § 30-40-26

West Virginia Code § 55-7-9

CASES:

Bowling v. Ansted Chrysler-Plymouth-Dodge, 188 W.Va. 468, 425 S.E.2d 144 (1992)

Cardinal State Bank, Nat. Ass'n v. Crook, 184 W.Va. 152, 399 S.E.2d 863 (W.Va. 1990)

Coberly v. Coberly, 213 W.Va. 236, 580 S.E.2d 515 (W.Va. 2003)

Edmiston v. Wilson, 146 W.Va. 511, 120 S.E.2d 491 (W.Va. 1961)

John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978)

Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332 (Ga. App. 1988)

SECONDARY:

West Virginia Real Estate Commission Agency Disclosure Form

DISCUSSION OF LAW

A. DUTY PLACED ON A REAL ESTATE SALESPERSON BY REAL ESTATE COMMISSION

Five times in the appellees' brief, they state that there is no duty placed on a real estate salesperson to anticipate a breach of contract and to protect a buyer and/or seller from such breach (i.e., third paragraph of page two, third paragraph on page three, first paragraph on page seven, third paragraph on page nine, first full paragraph on page eleven).

As alleged in paragraph 4 of the complaint, the

West Virginia Real Estate Commission, which licenses Marsha Ann Felton and Jean Hollandsworth, to:

> The agent may represent the seller, the buyer, or both. The party represented by the agent is known as the agent's principal and as such, the agent owes the principal the duty of utmost care, integrity, honesty and loyalty.
>
> Regardless of whom they represent, the agent has the following duties to both the buyer and the seller in any transaction:

* Diligent exercise of reasonable skill and care in the performance of the agent's duties.
* A duty of honest and fair dealing and good faith.
* Must offer all property without regard to race, color, religion, sex, ancestry, physical or mental handicap, national origin or familial status.
* Must promptly present all written offers to the owner.
* Must disclose all facts known to the agent materially affecting the value or desirability of the property.
* Provide copies of all contracts.

As the pleadings now stand, the appellees violated duties of utmost care and integrity that was owed to the appellants. Additionally, the appellees violated duties of "diligent exercise of reasonable skill and care in the performance of the agent's duties."

The breach of these duties is not based on the breach of the purchase offer contract concerning 339 Worley Avenue, Clarksburg, WV 26301, but the omissions of the appellees in failing to properly write the purchase offer contract concerning the sale of 601 Indiana Avenue, Nutter Fort, WV 26301. These are specifically set forth in paragraphs 46-67 of the complaint for Breach of Contract by Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth, Negligence of Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth, and Fraud by Marsha Ann Felton. On the alleged fraud by Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth are included on a respondeat superior claim in paragraphs 64–67 (contrary to appellees assertion in the first paragraph on page 3 of their brief that it was only directed at Marsha Ann Felton).

In the first paragraph on page ten, the appellees indicate that the appellants are attempting to hold respondents liable for not anticipating a breach by the Romanos. The undersigned sees that as a possibility based on the failure of appellee Felton to learn from history, besides

instructions of appellant Sedlock to condition the sale on the closing of the Romano house in the Moyle contract of July 5, 2004. However, as set forth in the preceding paragraph there were three cause of action alleged against the appellees based on the contract of July 5, 2004, concerning 601 Indiana Avenue, Nutter Fort, WV 26301.

B. DUTY PLACED ON A REAL ESTATE SALESPERSON BY WEST VIRGINIA CODE § 30-40-26

Appellant Sedlock had a contingency in her appellee Felton drafted purchase offer agreement dated March 29, 2004, that it was "(c)ontingent in part upon seller locating acceptable housing on or before June 15, 2004." See paragraphs 6 and 7 of the complaint and Exhibit 5 attached to and incorporated into the complaint. Appellees admitted this at page 5 of their brief. The Feltons unsuccessfully tried to talk appellant Sedlock out of the contingency provision on June 1, 2004. See paragraph 10 of the complaint. Appellants did not want to run the risk of selling their home and not have a new home to move into. The fact that such a provision was in the March 29, 2004, contract and that appellant Sedlock did not go to closing with the Moyles the first time around indicates that she was sticking to her beliefs.

The second time around, she discovers prior to signing the appellee Felton drafted purchase offer agreement dated July 5, 2004, that Mr. Romano has a history of not being a person of his written word, when it comes to selling his residence. Appellee Sedlock goes into investigative mode to confirm such. She notifies appellee Felton, her agent, of the possibility Mr. Romano has previously reneged. She pushes appellee Felton, her agent, to make inquiry. She obtains a verbal report from appellee Felton, her agent. Upon finding confirming information Mr. Romano reneged, she decides she needs to have a stronger contingency the second time around

with Moyles because she has already *tentatively* found suitable housing through the Romanos and she knows it is necessary to tighten the provisions with Moyles, so she will not be out in the street. She communicates to appellee Felton, her agent, that this time around appellant Sedlock told appellee Felton, her agent that she would not sell 601 Indiana Avenue, Nutter Fort, WV 26301, unless the sale was completed for 339 Worley Avenue, Clarksburg, WV 26301; again, appellee Felton, her agent said she understood. These are all facts and inferences that fairly rise from paragraphs 5-21 of the complaint as originally drafted and filed.

West Virginia Code § 30-40-26. Duties of licensees, states in applicable part as follows:

> Every broker, associate broker and salesperson owes certain inherent duties to the consumer which are required by virtue of the commission granting a license under this article. The duties include, but are not limited to:
>
> (f) Every licensee shall make certain that all the terms and conditions of a real estate transaction are contained in any contract prepared by the licensee.

No decisions can be found where this Court has interpreted the provisions of the statute. The language, "*The duties include, but are not limited to*" suggests the legislative intent is that it is not be narrowly construed. The language, "Every broker, associate broker and salesperson *owes certain inherent duties to the consumer* ," suggests the legislative intent is that it should be given a pro consumer interpretation. Looking at the application of this case to subsection "f", the appellee agent demonstrated the ability on March 29, 2004, to add contingencies. She demonstrated the ability to check out a seller's history for purposes of deciding whether or not to trust him. She voiced an understanding of knowing what contingency appellant Sedlock wanted in her contract and why (i.e., to avoid being left on the street).

It is hard for the undersigned to not see that appellee Felton did not have the duty under

West Virginia Code § 30-40-26(f) or negligence to put the provisions in the July 5, 2007, contract. West Virginia Code § 55-7-9. Violation of statutes states as follows:

> Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages.

It clearly appears that appellee Felton violated West Virginia Code § 30-40-26(f). If so, then the analysis under *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980), the West Virginia Supreme Court of Appeals set forth a four-part test to determine whether a private cause of action is implied from a statute:

> (1) The plaintiff must be a member of the class for whose benefit the statute was enacted;
>
> (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended;
>
> (3) the private cause of action must be consistent with the underlying purposes of the legislative scheme; and
>
> (4) the private cause of action must not intrude into an area delegated exclusively to the federal government.

Appellants were members of the public who employed agent Felton and broker Hollandsworth to sell and buy real estate through contracts drafted by agent Felton. The language of the statute reads for an interpretation to protect the public from state licensed real estate agents and brokers, such as agent Felton and broker Hollandsworth. A private cause of action meets the legislative scheme of having licensed real estate persons being responsible for their acts or their failure to act. The area of potential liability under West Virginia Code § 30-40-26 does not intrude into areas delegated exclusively to the federal government. It appears West Virginia Code § 30-40-26 is designed to provide consumer protection and such being a basis for civil liability fosters consumer

protection. A prima facie case of negligence should flow if appellee Felton is found to have violated West Virginia Code § 30-40-26

Appellees asserted on page 16 of their brief that the undersigned waived use of West Virginia Code § 30-40-26 by not bringing it to the attention of the circuit court and such should not be considered by this Court. Without even dealing with whether litigants should be permitted to research deeper into the law when given months to prepare for this Court versus days to get briefs filed with circuit courts, which occurred in this case, the appellees assertions are factually incorrect. The undersigned submitted a brief in opposition to the appellees motion to dismiss before the circuit court on September 30, 2006, which should be available to the Court, as the undersigned designated the entire record.

The brief of the undersigned before the circuit court states as follows (which is incorporated into this brief):

> Issue:
>
> Should the motion to dismiss the complaint filed by Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., be granted?
>
> Argument:
>
> *Coberly v. Coberly*, 213 W.Va. 236, 580 S.E.2d 515, 517 (W.Va. 2003), stated:
>
>> A fundamental precept governing the review of a motion to dismiss a complaint for failure to state a cause of action is set forth in Syllabus Point 3 of *Chapman v. Kane Transfer Company*, Inc., 160 W.Va. 530, 236 S.E.2d 207 (1977). That Syllabus Point states: **"The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."** See also, *John W. Lodge Distributing Company, Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d

907 (1978); and *Chapman v. Kane Transfer Company, Inc.*, supra.

(Bold face added).

Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., contend they owed no duty to plaintiffs concerning whether or not the contract for sale and purchase to sell the Sedlock house contained the contingency that it was subject to the plaintiffs securing another home. *Gallagher v. Washington County Savings, Loan & Building Co.*, 125 W.Va. 791, 25 S.E.2d 914 (W.Va. 1943), held

> Generally, a "real estate broker" is one who negotiates the sale of real property and whose business is that of finding a purchase who is willing to buy on terms fixed by owner.

Everett v. Brown, 174 W.Va. 35, 321 S.E.2d 685 (W.Va. 1984), held

> 3. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
>
> In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor.

W. Va. Code, § 30-40-26 provides in applicable part as follows:

> (f) **Every licensee shall make certain that all the terms and conditions of a real estate transaction are contained in any contract prepared by the licensee.**
>
> (Bold face added).

W. Va. Code, § 30-40-3 provides as follows:

> It shall be unlawful for any person to engage in or carry on, directly or indirectly, or to advertise or hold himself or herself out as engaging in or carrying on the business or act in the capacity of a real estate broker, associate broker or salesperson within this state without first obtaining a license as provided for in this article.

W. Va. Code, § 30-40-4 provides in applicable part as follows:

> (i) "License" means a license to act as a broker, associate broker or salesperson.
>
> (j) "Licensee" means a person holding a license.

Here, the plaintiffs contend, which at this juncture must be considered true that plaintiffs wanted the contingency included, Marsha Ann Felton knew it, Marsha Ann Felton represented it was included, Marsha Ann Felton failed to include it, and Marsha Ann Felton admitted she failed to include it. Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., were licensees, who admitted in their motion to dismiss that Marsha Ann Felton prepared the contracts in dispute, violated W. Va. Code, § 30-40-26 (f) quoted above, which was a duty owed to the plaintiff. that Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc. West Virginia Code §, 55-7-9, provides as follows:

> Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages.

Cardinal State Bank, Nat. Ass'n v. Crook, 184 W.Va. 152, 399 S.E.2d 863, 866-867 (W.Va. 1990)

> We have long recognized the general rule that parol evidence of prior or contemporaneous oral negotiations or stipulations is inadmissible to vary, contradict, add to, or explain the terms of a complete, unambiguous written instrument. In Syllabus Point 1, *Kanawha Banking and Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E.2d 225 (1947), we stated the parol evidence rule as:
>
> Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration.
>
> Accord Syllabus Point 3, *Tri-State Asphalt Products, Inc. v. McDonough Co.*, 182 W.Va. 757, 391 S.E.2d 907 (1990); *Glenmark Assoc. v. Americare of W.Va.*, 179 W.Va. 632, 371 S.E.2d 353, 356 (1988); *Mundy v. Arcuri*, 165 W.Va. 128, 267 S.E.2d 454 (1980); Syllabus Point 1, *North American Royal Coal*

Co. v. Mountaineer Developers, Inc., 161 W.Va. 37, 239 S.E.2d 673 (1977). The parol evidence rule also applies to notes. See *Tabler v. Hoult*, 110 W.Va. 542, 158 S.E. 782 (1931) (refusing to admit parol evidence of an alleged agreement that the payee was not required to pay the note); *Capital City Bank v. Foster*, 112 W.Va. 520, 165 S.E. 802 (1932) (refusing to admit parol evidence of an alleged contemporaneous oral agreement changing the time of payment); *West Virginia Mack Sales Co. v. Brown*, 139 W.Va. 667, 81 S.E.2d 103 (1954).

However, we have recognized "the general rule that parol evidence is admissible to show conditions precedent which relate to the delivery or the taking effect of a written instrument." *Hamon v. Akers*, 159 W.Va. 396, 222 S.E.2d 822 (1976) (quoting 30 Am.Jur.2d Evidence § 1038); *Weirton Savings and Loan Co. v. Cortez*, 157 W.Va. 691, 203 S.E.2d 468 (1974); *Miners' and Merchants' Bank v. Gidley*, 150 W.Va. 229, 144 S.E.2d 711 (1965). In *Hamon*, the parties agreed that there would be no conveyance without the release of a particular deed of trust. We held that the evidence demonstrated a condition precedent and allowed the admission of parol evidence. Hamon supra 159 W.Va. at 400, 222 S.E.2d at 825-26. *Hamon* also requires that the condition precedent not be inconsistent with the instrument. Id. 159 W.Va. at 401, 222 S.E.2d at 826; *Weirton Savings*, supra 157 W.Va. at 700, 203 S.E.2d at 474. "Where the alleged condition precedent is inconsistent with the written instrument, parol evidence thereof is inadmissible." 32A C.J.S. Evidence § 935 (1964).

Plaintiffs claim fraud and mistake in the complaint. Parol evidence is admissible to establish the same. *Shinn v. West Virginia Ins. Co.*, 104 W.Va. 353, 140 S.E. 61, 62 (W.Va. 1927), stated:

Defendant, by counsel, objected to the introduction of parol evidence to vary the terms of a written contract. In *Deitz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909, this court said:

"Parol evidence is competent to prove that the application was filled up by the agent of the company, and that the facts were fully and correctly stated to him, but that he without knowledge of the insured misstated them in the application. This is not a violation of the rule, that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground, that the contents of the

> paper was not his statement, though signed by him, and that the company by the acts of its agent, in the matter is estopped to set up, that it is a representation of the insured. > Insurance Co. v. Wilkinson, 13 Wall. 222 [20 L. Ed. 617]; May, Ins. § 143, and cases cited."
>
> This principle is well supported by the authorities. 2 Joyce on Insurance (2d Ed.) § 485; 33 C. J. 117; 14 R. C. L. 1176, and the cases cited. "If the facts regarding the risk are correctly stated to the agent, but erroneously inserted by him in the application, the company is chargeable with his error or mistake." *Coles v. Jefferson Insurance Co.*,
>
> 41 W. Va. 261, 23 S. E. 732.

Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., contend there was an absence of consideration because they received no benefit for leaving out the provision that the contract was contingent upon "plaintiffs locating acceptable housing." Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., had a duty under W. Va. Code, § 30-40-26 (f) to include the provision. They have the privilege of selling real estate, if they comply with law applicable to them. That is consideration.

Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., are trying to look at the provision that the contract was contingent upon "plaintiffs locating acceptable housing" in a vacuum, which means ignoring all the surrounding facts. Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., entered into a contingency contract with Elizabeth A. Sedlock to have the exclusive right to sell the the Sedlock house on a percentage basis and for that Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., would receive a cut of the sales proceeds and Elizabeth A. Sedlock and all others were prohibited for the term of the contract from selling the Sedlock house. If the Sedlock house was to be sold, then the plaintiffs would not have a place to live and Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., had their feet in the door to sell one of their listings to the plaintiffs or co-broke a house in the multi-listing and either way get a chance to increase their commission by 150-200%. Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., had the plaintiffs in the palm of their hand who only wanted not to be left homeless, which is not an unreasonable request. Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., had ample consideration for continuing to inserting this minor provision.

Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., contend that since the June 26, 2004, contract (exhibit 6 attached to the complaint) was signed that they could ignore the law (i.e., W. Va. Code, § 30-40-26 [f]) because the contingency had been met. The facts of the complaint, which plaintiffs

get the benefit of says otherwise. Additionally, Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., had to know that real estate deals go sour and the plaintiffs could be left holding their bags because Marsha Ann Felton is now saying she had no reason to continue to include the requested provision of the plaintiffs. This is now a factual dispute, which means this case should not even be the subject of a summary judgment, let alone a motion to dismiss.

Article 3, § 10, of the West Virginia Constitution, which provides as follows:

> No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

This is similarly provided in the Fifth and Fourteenth Amendments to the United States Constitution.

Conclusion:

The motion to dismiss of Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., should be denied

The undersigned did bring West Virginia Code § 30-40-26(d) to the attention of the circuit court.

Appellees state at page 16 of their brief that the denial of appellants' motion to amend on October 27, 2007, by this Court (on a 3-2 ruling) barred use of West Virginia Code § 30-40-26(f). Appellants sought in the motion to amend to include, based on a deposition following the circuit courts dismissal of the appellees to add a paragraph 13.1 to their complaint, which would have read as follows:

> **13.1 Thomas L. Moyle told Marsha Ann Felton that unless the 'finding suitable house contingency' was removed from Exhibit 5, that he would not be interested in signing another purchase offer agreement for the realty of Elizabeth A. Sedlock at 601 Indiana Avenue, Nutter Fort, WV 26301.**

This requested amendment had nothing to do with West Virginia Code § 30-40-26.

C. PROCEDURAL CRITIQUES

Appellees state that the appellants have not made a short and plain statement of the claims. Appellant will not suggest that the complaint is short, but there were five causes of action against five separately served parties with two of the causes being fraud, that needed to be plead with particularity. The size was needed to clearly flush out what the significant events were concerning multiple people (that exceeded those served), two separately owned homes being the subject of three separate real estate purchase agreements, and head games by some of the parties.

suitable Appellants' complaint states appellants requested appellee Felton to include in the July 5, 2005, a suitable housing contingency similar to dated March 29, 2004. The complaint is plain.

Appellees assert that the appellants have not pleaded fraud with particularity. They cite a quote from Justices Cleckley and Davis's Litigation Handbook with six elements for fraud. *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144 (1992):

> " 'The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; (3) that plaintiff relied on it and was justified under the circumstances in relying upon it; and (4) that he was damaged because he relied on it.' Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981)." Syllabus Point 2, *Muzelak v. King Chevrolet, Inc.*, 179 W.Va. 340, 368 S.E.2d 710 (1988).

Appellants' fraud claim against appellee Felton stated as follows:

> 59. Marsha Ann Felton had prepared the purchase offer agreements attached hereto as Exhibits 5 and 6 and incorporated herein by reference as if fully set forth herein.
>
> 60. Marsha Ann Felton had Elizabeth A. Sedlock sign Exhibit 5, which was prepared the way Elizabeth A. Sedlock requested, and this induced plaintiffs to trust Marsha Ann Felton; Marsha Ann Felton induced Elizabeth A. Sedlock sign Exhibit 6 based on her representations that Exhibit 6 contained the language of

Exhibit 5, insofar as that it was contingent upon her ". . . locating acceptable housing. . . .", by materially and falsely claiming she had included the said contingency.

61. Plaintiffs relied upon Marsha Ann Felton, who is a licensed real estate agent, which was justified because of her preparing Exhibit 5.

62. Plaintiffs reasonably believe that Marsha Ann Flelton committed the fraud because of the prospects of collecting multiple commissions and she incorrectly believed the Romanaos would honor their agreement.

63. Marsha Ann Felton's fraudulent actions were wilful and malicious, wanton, or intentional.

. . .

67. Plaintiffs were damaged by Marsha Ann Felton, Double H Realty, Inc., and Jean Hollandsworth and as set forth in paragraph 45 herein, plus they suffered mental anguish, they were unable to enjoy life, and they were otherwise injured.

The fraud claim substantially complies with the elements.

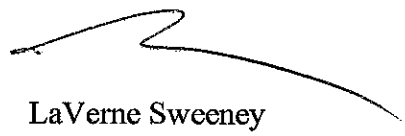
Cardinal State Bank, Nat. Ass'n v. Crook, 184 W.Va. 152, 399 S.E.2d 863 (W.Va. 1990), held as follows:

1. "Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration." Syllabus Point 1, *Kanawha Banking and Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E.2d 225 (1947).

RELIEF PRAYED FOR

Appellants pray that this Honorable Court reverse the decision of the Circuit Court of Harrison County and remand the case back to the Circuit Court of Harrison County.

Respectfully Submitted,



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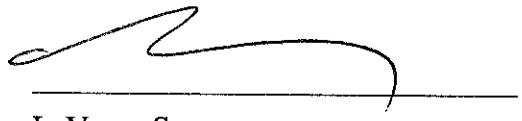
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served on each of the attorneys of record of all parties to the above-styled cause by enclosing the same in an envelope addressed to each such attorney and/or party, if a party has filed pleadings and is not represented by counsel, at his or her respective address as disclosed by the pleadings a record herein and set forth below, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Grafton, West Virginia, on the 29th day of November, 2007, as set forth below:



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1900 KANAWHA BLVD E
CHARLESTON WV 25305

HARRSION COUNTY CIRCUIT CLERK
HARRISON COUNTY COURTHOUSE
310 W MAIN ST
CLARKSBURG WV 26301
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